In the ultimate analysis I have no hesitation in holding that the aforesaid prayers (ii) and (iii) appearing in the defendant's application dated 11th December 1990 to set aside the order of the court dated 28th November 1990 should not have been entertained. In the result of the order of the court dated 21st January 1991 must pursuant to this judgment be varied accordingly.

VISION TECH ENTERTAINMENT SDN. BHD.

v.

MOVIE MASTER DISTRIBUTORS SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-470-92]
10 SEPTEMBER 1992

INJUNCTION: Application to set aside - Injunction obtained ex parte - Issue was a simple and straightforward one - Whether there was serious questions to be tried - Whether balance of convenience lay in favour of defendant - Whether there should be an inquiry into damages.

The plaintiff had obtained an *ex parte* injunction against the defendant restraining them whether by themselves their directors, servants or agents or any of them or otherwise from doing the following acts or any of them:

(i) infringing the plaintiff's copyright or rights in the nature or copyright substiting in and to the wrestling programmes produced by the World Wrestling Federation (hereinafter referredto as "WWF") and owned by Titan Sports Incorporated (hereinafter called "TSI") in the United States of America by doing the following things or acts or any them, namely manufacturing, duplicating, exhibiting distributing, let or hire, offering for sale by way of trade or otherwise any of the said WWF wrestling programmes whether containing in the form of video cassettes or otherwise;

(ii) enabling, aiding, assisting or causing others to infrings or engage directly or indirectly in the acts referred to in paragraph (i); and

(iii) representing, and/or holding out themselves as the licencee in Malaysia in relation to the said WWF wrestling programmes for homevideo rights including collection of proceeds, royalty, license fees, commission and'or otherwise from any third parties howsoever by representing themselves in the aforesaid capacity.

On 17 April the defendant upon a certificate of urgency applied to set aside the order made on 25 March 1992 and that the plaintiff pay the

defendant damages suffered by the defendant and as ascertained by the Court.

Held:

[1] The plaintiff's arguments that the agreement produced by the defendant as testimony of their rights to the WWF programmes was not a licence and merely an agency agreement was quite contrary to the documents produced by the defndant and was therefore unacceptable and should be rejected in the circumstances.

[2] There was a serious question to be tried and the balance of convenience lay in favour of the defendant.

[3] Details to the rights to the WWF programmes particularied by the defendant had not been disclosed by the plaintiff when they made their *ex parte* application and as such the injunction could be set aside without consideration of the merits.

[4] A careful consideration of the merits only supported the view that the injunction ought to be set aside.

[Injunction set aside with costs. Damages to be assessed by SAR].

Cases listed at the end of the judgment:

Thermax Limited v. Schott Industrial Glass Limited [1981] FSR 289
P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors. [1985] 1 MLJ 86
KSM Credit & Leasing Sdn. Bhd. v. Datamaute (M) Sdn. Bhd. & Ors. [1986] 1 CLJ 500
Evercrisp Snack Products (M) Sdn. Bhd. & Anor. v. Sweeties Food Industries Sdn. Bhd. [1980] 2 MLJ 297
Tavener Rutledge Ltd. v. Specters Ltd. [1957] RPC 498
Bravingtons Ld. v. Barrington Tennant [1957] RPC 183
Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor. [1986] 2 MLJ 198
American Cyanamid Company v. Ethicon Limited [1975] FSLR 101
Cayne and another v. Global Natural Resources plc [1984] 1 All ER 225
The Athletes Foot Marketing Associates Inc. v. Cobra Sports Ltd. and Another [1980] RPC 343
Brigid Foley Limited v. Ellott and Others [1982] RPC 433
Vapormatic Co. Ltd. v. Sparex Ltd. & Anor. [1976] 1 WLR 939
Lim Kit Siang v. United Engineers (M) Bhd. & 3 Ors. [1987] 2 CLJ 233
Habib Bank Ltd. v. Habib Bank A.G. Zurich [1981] 1 WLR 1265
Coco v. A.N. Clark (Engineers) Ltd. [1969] RPC 41
Vernon & Company (Pulp Products) Ltd. v. Universal Pulp Containers Ltd. [1980] FSLR 179

For the Plaintiff - Anthony Ng; M/s. Anthony Ng & Co.
For the Defendant - Michael Soo; M/s. Shearn Delamore & Co.

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

Upon a certificate of urgency, the plaintiff had *exparte* on 25 March 1992 successfully applied for the defendant, whether by themselves, their directors, servants or agents or any of them or otherwise howsoever be restrained until further order from doing the following acts or any of them:

(a) infringing the plaintiff's copyright or rights in the nature or copyright subsisting in and to the wrestling programmes produced by the World Wrestling Federation (hereinafter "WWF") and owned by Titan Sports Inc. (hereinafter "TSI") in the United States of America by doing the following things or acts or any of them, namely manufacturing, duplicating, exhibiting, distributing, let or hire, offering for sale by way of trade, using or importing for purposes of trade or keeping whether for purposes of disposal by way of trade or otherwise any of the said WWF wrestling programmes whether containing in the form of video cassettes or otherwise;

(b) enabling, aiding, assisting or causing others to infringe or engage directly or indirectly in the acts referred to in paragraph (a); and

(c) representing, and/or holding out themselves as the licencee in Malaysia in relation to the said WWF wrestling programmes for home video rights including collection of proceeds, royalty, license fees, commission and/or otherwise from any third parties howsoever by representing themselves in the aforesaid capacity;

and for costs.

On 17 April 1992, also upon a certificate of urgency, the defendant had applied to set aside the order made on 25 March 1992 and that the plaintiff pay the defendant such damages, as

suffered by the defendant consequent to the order and as ascertained at an inquiry, and costs.

On the first hearing date on 29 April 1992, learned Counsel for the plaintiff had applied for an adjournment to file an affidavit in reply and to get further instructions and despite objections from learned Counsel for the defendant, the application for postponement was allowed. The tables were turned on the next date, that is, 20 May 1992 when learned Counsel for the defendant asked for the matter to be postponed to enable them to reply to the plaintiff's affidavit. Despite objections from learned Counsel for the plaintiff, another postponement was granted. On the third date namely 22 June 1992, learned Counsel for the plaintiff again asked for an adjournment to enable them to file an affidavit by TSI who he said had agreed to be the co-plaintiff. In the circumstances, the court allowed a final postponement of one week.

The matter was finally argued on 30 June 1992 and on 5 August 1992, having considered the submissions, the court had allowed the defendant's application with costs. It is pertinent to point out that before these arguments, learned Counsel for the plaintiff had again asked for an adjournment to file a reply to the defendant's affidavit in reply to TSI's affidavit or in the alternative he had stated that he could proceed provided the court ignored the defendant's latest affidavit in reply. Apart from the fact that TSI have yet to be made co-plaintiff despite the adjournments, the court saw no reason to disregard the defendant's latest affidavit in reply as it ought to consider all affidavits filed before the hearing. The court, however, gave learned Counsel for the plaintiff the choice of the matter going on under these circumstances or applying for an adjournment to make TSI a co-plaintiff and to file an affidavit in reply provided they pay the costs of the postponement but he had opted for the former.

Despite the lengthy affidavits, the court found, after painstaking perusal of the averments made, that the issue was in fact a simple and straightforward one. The whole confusion had arisen because TSI had given two licences to two different parties on different dates. The first was to the defendant's principal Adnan Ahmad Ezrique of Blue Belt Trading Company in Kuwait (hereinafter "Adnan") who on 1 June 1987 had entered into an agreement with Sanjay Video Pte. Ltd. of Blok 501, West Coast Drive, Singapore (hereinafter "Sanjay") giving Sanjay the exclusive licence in respect of all types, kinds, forms and manner of copyright pertaining to the wrestling video programmes in Malaysia and Singapore produced or promoted by the WWF, National Wrestling Alliance, American Wrestling Alliance, Texas Wrestling and Japan Pro-Wrestling-On. The agreement included rights of sale, distribution, redubbing, assignment to the others, lease rights, right of exploitation, exhibition and distribution in video rights inclusive of rights for the purposes of home viewing only. This was to expire on 31 December 1990 and was to supercede an earlier agreement dated 27 February 1987.

The same parties had entered into another agreement on 1 January 1990 where Sanjay had been granted an exclusive licence and right to reproduce, duplicate and distribute and to authorise others to do similar acts in respect of home video cassette rights for purposes of home and domestic viewing in Malaysia, Singapore and Thailand covering wrestling programmes produced by the WWF. Due to end on 31 December 1992, that agreement is therefore still in existence at this time.

WWF is owned and controlled by Titan Enterprises International (hereinafter "TEI") and TSI, and TEI and WWF had on 1 January 1986 appointed Adnan as exclusive licencee and distributor for all WWF's programmes in all Arabic speaking countries; Malaysia, Singapore, Indonesia, Pakistan, India, Fiji Islands and Sri Lanka. The appointment is for ten years and therefore is still subsisting at the date of writing.

On 28 February 1987, TEI and WWF had acknowledged and confirmed the appointment of Sanjay as exclusive agent for WWF's programmes in Malaysia and Singapore. This expired on 27 February 1988. The next distributorship/agency documents tendered were from TSI and WWF to Sanjay, and to the defendant, valid in Singapore and Malaysia respectively up to 27 February 1990. It is pertinent to pause here to compare the three acknowledgments and confirmations stated. In the first, it is signed by James E. Troy as Vice President of TEI and WWF while in the second and third he had signed it as Senior Vice

President in charge of International and Pay-Per-View Operations for TSI and WWF. In addition, James E. Troy had affirmed an affidavit on 24 January 1989 which is reproduced here for ease of reference:

Affidavit

I, Mr. James E. Troy, of full age and care of Titan Sports, Inc. 1055 Summer Street, Stamford, CT 06905, do solemnly declare and make this affidavit as follows:

1. I, as the Senior Vice President of International for Titan Sports, Inc. (hereinafter called "Titan") am duly authorized to make this affidavit and say as follows:

   (i) Titan holds the copyright of all World Wrestling Federation programs and that Titan has licensed the copyright of the said videogram for all Arab Speaking countries and Singapore, East & West Malaysia and Thailand to Mr. Adnan Ahmad Ezrique of Blue Belt Trading Co., in Kuwait.

2. I further state that:

   (i) Copyright subsists in the said videogram in the world and it is still subsist.

   (ii) That Titan has licensed the copyright of the said videogram for the territory of all Arab Speaking countries and Singapore, East & West Malaysia and Thailand to Mr. Adnan Ahmad Ezrique of Blue Belt Trading Co., Kuwait.

3. That Mr. Adnan Ahmad Ezrique of Blue Belt Trading Co., has the sole exclusive license from the copyright owners for exhibition, sales, distribution and reproduction and may license others to exhibit, sell, distribute and/or reproduce the said copyright programs for the aforementioned territory (2ii).

Affirm by the said
(James E. Troy)

on this 24th day of January 1989

at Stamford, Ct. (USA).

Numerous other documents supporting the defendant's application had been attached to their affidavits and need not be restated here. The fact was that the defendant had got the rights and commenced business way back on 7 July 1987 without any interruptions till 25 March 1992. Specific mention must be made of the latest letter from Sanjay dated 13 June 1992 which had confirmed that the defendant had been assigned the copyright for releasing WWF wrestling tapes in Malaysia up to 31 December 1992.

Learned Counsel for the plaintiff had questioned the validity of all the agreements produced by the defendant as testimony of the fact of their rights to the WWF programmes as his contention was that it is not a licence given to the defendant but merely an agency agreement. In one of their supporting affidavits, the plaintiff had stated that TEI had no right to reproduce WWF video products and were never authorised to permit the reproduction of WWF video for commercial sales. He had further stated that in any case TEI had been dissolved on 16 December 1986 and that James E. Troy had no power to give the licence. This argument was, to my mind, quite contrary to the documents produced by the defendant as referred to earlier, in particular the affidavit of James E. Troy himself, and was therefore quite unacceptable and should be rejected in the circumstances. The fact that TSI had yet to be made the co-plaintiff despite the assurances of learned Counsel for the plaintiff when applying for the adjournments is yet another factor against the plaintiff considering that TSI is the more aggrieved plaintiff if they had become co-plaintiff. Further, if TSI had been made co-plaintiff, these facts would show that they had been guilty of delay, laches, acquiescence and estoppel.

On these facts, the court was of the view that there was a serious question to be tried and that the balance of convenience, since the defendant had produced the relevant documents to support the fact that they had had the exclusive right to the WWF programmes for the last five years, certainly lay in favour of the defendant.

Further, all the details to the rights to the WWF programmes particularised by the defendant had not in fact been disclosed by the plaintiff, who was in a position to know if they were acting for TSI as well, when they made their *exparte* application for the injunction and on that failure alone, as has been decided time

and time again, the court could have set the injunction aside without any consideration of the merits. However, a careful consideration of the merits had only supported the view that the injunction ought to be set aside with costs and an inquiry be held to ascertain damages suffered by the defendant consequent to the grant of the injunction to the plaintiff. Accordingly, the court had granted the defendant's application with costs and had directed that damages are to be assessed by the learned Senior Assistant Registrar.

YEO AH TEE @ YEO SOON SENG

V.

LEE YONG HENG & 3 ORS.

HIGH COURT, JOHOR BAHRU
DATUK L.C. VOHRAH J.
[CIVIL SUIT NO. 22-93 OF 1989]
8 OCTOBER 1992

PRACTICE AND PROCEDURE: Taxation of costs - Defendants allowed getting-up fee in respect of earlier application - Plaintiff withdrawing suit - Whether defendants entitled to getting-up fees again.

The plaintiff's application for an interlocutory injunction was dismissed with costs wherein the learned judge allowed a sum of RM3,500 as getting-up fee. The plaintiff subsequently applied to withdraw the suit against the first, second and third defendants which application was allowed with costs to the three defendants.

In taxing the bill of costs, the SAR allowed a sum of RM5,000 for getting-up of the case in defending the suit.

Counsel for the plaintiff contended that since one getting-up fee had already been allowed, there ought in principle not be another getting-up fee in respect of the action which was withdrawn.

Held:

[1] The statement of claim, apart from asking for the injunction also sought a declaration that an order granted by the court in an earlier action was null and void, on the ground, *inter alia*, of fraud which required consideration of the law in respect of fraud.

[2] Much more work had been done for the defence of the action generally than for the defence of the application for the interlocutory injunction.

[3] Where proceedings in an action have reached a stage when a hearing in open court in inevitable, the solicitors of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not.

[Plaintiff's application for review of the SAR's decision dismissed with costs].